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No. 2522

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LOW KWAI and MRS. LOW KWAI, sometimes known as HO SHEE or HO (HAW) SHEE,

Appellants,

vs.

SAMUEL W. BACKUS, as Commissioner of Immigration, Port of San Francisco,

Appellee.

BRIEF FOR APPELLANTS.

Filed
JUN 14 1915
F. D. Monckton,
Clerk.

WM. HOFF COOK,
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Attorneys for Appellants.

Filed this..day of May, 1915.

FRANK D. MONCKTON, Clerk.

By..Deputy Clerk.

PERNAU PUBLISHING COMPANY

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This is an appeal from an order made by the District Court, discharging a writ of habeas corpus, and remanding Ho Shee, under a warrant for her deportation to China, by the immigration officers.

The record shows that she entered the United States, as the wife of Low Kwai, a native born citizen, on or about October 14, 1912, and that on April 2, 1913, the Acting Commissioner, at San Francisco, recommended to the Secretary of Labor, that a warrant for the arrest of Ho Shee issue; and said

recommendation is based solely upon the recital therein (Trans. Record, p. 17) that:

> "It is stated from an anonymous source that this woman is now practicing prostitution in either the Oriental Hotel or the Republic Hotel, keeping one of the rooms in either hotel from time to time."

Upon this recommendation a warrant was issued reciting, as a fact, based solely upon the foregoing recommendation,

> "that the said alien is a prostitute and has been found practicing prostitution subsequent to her entry into the United States."

If such a finding of fact is a fair finding, based upon an anonymous communication, then the liberty of no one is safe; in fact the immigration officers only seem to lend themselves to issuing warrants for the arrest of Chinese, upon anonymous information, whereas, in the case of other aliens, they require a sworn affidavit, as the basis of issuing a warrant.

We, therefore, contend that the Secretary of Labor had no right or authority to issue the warrant of arrest, without a proper sworn affidavit or complaint, as the basis thereof, and that all subsequent proceedings, had upon such invalid warrant of arrest, are null and void; there can be no doubt that if, this letter of recommendation for a warrant, and the warrant, were the entire authority for the detention of Ho Shee, that she would be entitled to her discharge upon habeas corpus; and we respect-

fully submit that as the initial proceedings for the arrest of Ho Shee were, and are, invalid, that no proceedings should have been had thereon, and, therefore, that all of the ex parte proceedings, had by the immigration officers, are, and were, invalid, besides being clearly unfair.

This invalid warrant was issued on April 11, 1913 (Trans. Record, p. 19), and this warrant was not executed until October 17, 1913, when Ho Shee was arrested in Sacramento upon the street.

On October 20, 1913, these immigration officers go through an ex parte proceeding, which they claim is perfectly fair, but which in our opinion, is a real "star chamber proceeding", and in which certain ex parte statements are made by Tien Fuh Wah and Dondalina Cameron; and then Ho Shee is asked a number of questions, with no attorney present, and without being first advised as to her right to an attorney, and then, as a sort of "*fair peroration*" the inspector says (Trans. Record, pp. 32 and 33):

> "Pursuant with instructions contained in Departmental Warrant dated April 11, 1913, you are now brought before me, an immigration inspector, to show cause, why you should not be deported as an immoral person having been found practicing prostitution subsequent to your entry into the United States. You are advised that you have the right to be represented by counsel and that your attorney may inspect the record."

Under some of the decisions everything that took place prior to the "last gasp admonition" of the inspector would be held to be *some* evidence to sustain the issuance of a warrant of deportation.

It is difficult for us to understand how any such procedure can be sustained as a fair hearing, and as justifying a warrant of deportation.

Surely if this Ho Shee were before a committing magistrate, for a preliminary examination, and he was by law directed to advise her of her right to be represented by counsel, and that, in spite thereof, that the committing magistrate proceeded to examine witnesses, and herself, without the presence of counsel, and, thereafter, at the conclusion of such examination, advised her of her right to counsel, and then ordered her held to answer for the offense charged, certainly no Court would hold that such was a fair proceeding, or a legal examination.

We contend therefore that everything that transpired, prior to the admonition of the inspector, should be eliminated, and if such testimony, and the testimony and statements of the witnesses Weaver, Malone, Anna Phelps and Rose Ying, taken ex parte in Sacramento, on October 17, 1913 (Trans. Record, pp. 153 et seq.) are also eliminated, then there is absolutely no evidence, of any kind, to sustain the conclusions of the immigration officers, directing the warrant of deportation to issue.

Ex parte Bang Shew, 220 Fed. Rep. 387.

Exceptions and protest were duly taken and made by Mr. McGowan, as attorney for Ho Shee, at dif-

ferent subsequent stages of the immigration proceedings (Trans. Record, p. 103). The record shows that Mr. McGowan presented affidavits (which were the only means afforded him for presenting any testimony), which established the fact that no warrant of deportation should be issued in this case, and the record itself shows that the counsel for Ho Shee was denied the right and privilege of cross-examining any witness, who had made any affidavit, on behalf of the immigration authorities.

We respectfully ask, in connection with this proof, that the Court consider the brief on behalf of defendant, presented to the department, beginning at page 108 of the Transcript of the Record, and also at page 120 thereof.

We contend in this action that the Secretary of Labor was without authority or jurisdiction to issue the original warrant of arrest, or to direct the deportation of Ho Shee, because there was no evidence or proof upon a fair hearing to sustain the charge made in the original warrant, or the finding in the order of deportation, and without such proof the proceeding, and warrant, were void, and with no legal effect.

Ex parte Lam Pui, 217 Fed. Rep. 456.

From the very inception of the proceedings, for the arrest and deportation of Ho Shee, her rights seem to have been entirely disregarded, and the immigration authorities seem to have assiduously put into the record a lot of ex parte statements, or affidavits, in entire disregard of the rules of the De-

partment to the effect that before any testimony is taken, that the party should be advised of her right to counsel, and that counsel should have the right to be present at all of the proceedings.

These immigration officers seem to rely upon the fact that, if they can get ex parte affidavits, or statements, into the record, tending in any degree to establish that the party complained of is an undesirable alien, that their sole purpose will then be accomplished for enforcing the deportation of such alien, in reliance upon the decisions of the Courts, that the finding of immigration officers is final, and not reviewable in judicial proceedings.

We submit that no such ex parte statements, which are the basis, and sole support, of the warrant of deportation, in this action, should be approved by this Court, or be given the stamp of judicial approval, as being the result of a *"fair hearing",* and that this Court should, by its decision in this case, determine and decide, that no hearing is fair, which is based solely upon ex parte statements, taken before the alien is advised of her right to have counsel present, or taken ex parte, and without the opportunity of such counsel to cross-examine the witnesses.

As demonstrated in this case all of the testimony claimed to justify the warrant of deportation was taken upon oral questions and answers, and not by affidavits, and was taken ex parte, and in denial of the right to Ho Shee to have her counsel present, and in fact, *all of such testimony* had been taken

before she was even advised that she had the right to be represented by counsel.

We earnestly recommend, therefore, that the judgment in this case be reversed.

Dated, San Francisco,
May 12, 1915.

Respectfully submitted,
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Geo. A. McGowan,
Attorneys for Appellants.